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No. 81-38
IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, etc., *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment invalidate a state constitutional amendment which conforms state court use of mandatory student assignment and transportation to that authorized for federal courts under the Fourteenth Amendment?

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

On November 6, 1979, the Equal Protection Clause of the California Constitution was amended by Proposition 1 to provide in relevant part that

> "nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation."[1]

This Court has approved the use of court-ordered reassignment of students, but it has done so only where that remedy is used to break down an established system of de

[1]The full text of article I, section 7(a) is printed at pages A1-A2 *infra*.

jure segregation in which the Fourteenth Amendment rights of minority schoolchildren were violated. *E.g., Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979); *Swann v. Board of Education*, 402 U.S. 1, 22-23 (1971). The Court has held that there is no federal constitutional duty to use mandatory student reassignment or other desegregation remedies to correct de facto segregation resulting from housing patterns or other demographic factors beyond the control of a school district. *E.g., Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977) (*Dayton I*); *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*).

Proposition 1 incorporates all of these decisions as the governing standard in school desegregation cases based upon the California Constitution. In order to require the assignment or transportation of students, a California state court, like a federal court, must find de jure segregation in violation of the Fourteenth Amendment.

I.
PROCEEDINGS IN THE TRIAL COURT.

This case was filed on August 12, 1963, several weeks after the California Supreme Court stated in dictum in *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that the Equal Protection Clause of the California Constitution required school districts to remedy de facto segregation in their schools. It was filed as a class action against the Board of Education of the City of Los Angeles, the governing body of the Los Angeles Unified School District ("the District"). Petitioners purport

to represent all minority students attending the District's schools. Cert. Petition ii.[2]

On May 12, 1970, the trial court (Superior Court Judge Alfred T. Gitelson) entered a judgment and writ of mandate which required the District to prepare a plan for the desegregation of its schools. J.A. 139. Following an appeal by the District, the California Supreme Court affirmed with modification and remanded with instructions to the District to take "reasonably feasible steps to alleviate segregation and its accompanying harms." *Crawford v. Board of Education*, 17 Cal.3d 280, 286, 551 P.2d 28, 130 Cal.Rptr. 724 (1976) *(Crawford I)*. The court stated in dictum that the trial court's findings adequately supported the conclusion that segregation in the District was de jure in nature, but it expressly did not rest its decision on that characterization. 17 Cal.3d at 285. Instead, the court reaffirmed its dictum in *Jackson* and held that there was an "obligation under the State Constitution" to undertake reasonably feasible steps to alleviate school segregation "whether the segregation be de facto or de jure in origin." 17 Cal.3d at 290 and 301. Because the California Supreme Court's decision was based upon its construction of the California Constitution, the District did not seek review before this Court.

Following remand, the trial court (Superior Court Judge Paul Egly) commenced renewed proceedings in February 1977. On March 18, 1977, the District submitted its first desegregation plan, which included mandatory reassignment of students on a limited basis. After a three-month trial, the

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[2]Throughout this brief we will cite to the Joint Appendix ("J.A."), the Petition for Certiorari ("Cert. Petition"), the Clerk's Transcript from the trial court ("C.T."), and the appendix of testimony and exhibits filed by the District in the Court of Appeal ("Dist. App."). All C.T. and Dist. App. references are contained in the certified record from the Court of Appeal.

trial court on July 5, 1977, rejected the plan and ordered the District to return a new plan within ninety days, after examining "all reasonable alternative plans." J.A. 139, 162.

The District did not appeal the trial court's rejection of its first plan, but instead returned a new plan ("Plan 2") on October 3, 1977, within the ninety-day period specified by the court. Following hearings, the trial court entered an interlocutory minute order which approved implementation of Plan 2 beginning in September 1978, subject to later reexamination and modification. J.A. 169. The court's minute order described Plan 2 as "an important initial step toward eventual compliance with the writ of mandate." J.A. 173.

During the summer of 1978, intervenor Bustop moved to stay implementation of Plan 2, contending that the plan violated the constitutional rights of schoolchildren. The trial court denied the motion, but the Court of Appeal granted a stay incident to Bustop's appeal. The California Supreme Court vacated the stay and Justices Rehnquist and Powell each refused to intervene pending review by this Court. *Bustop, Inc. v. Los Angeles Board of Education*, 439 U.S. 1380, 1384 (1978).

Plan 2 commenced operation on September 12, 1978. By providing for mandatory reassignment of approximately 40,000 students attending grades 4 through 8 of every school with a white enrollment over 70% (except one, which is geographically isolated), it was one of the nation's most extensive plans of mandatory student reassignment. *See generally*, C.T. 2730-5314. Plan 2 also provided for the voluntary transfer of over 30,000 students through the creation of magnet schools and permits with transportation (PWT), an optional transfer program. *Id.*

In March 1979 the District filed with the trial court a comprehensive analysis of the first semester performance of Plan 2. Because of the plan's failure to desegregate, due in large part to unprecedented losses of white students, the District recommended no further additions to the mandatory reassignment component and instead proposed expansion of the voluntary programs. C.T. 9830-11531.

By fall 1979, all parties wanted Plan 2 discontinued. On October 22, 1979, the trial court commenced renewed hearings to consider alternatives to Plan 2. The District submitted an all-voluntary desegregation plan which proposed to expand the existing magnet program and PWT program to include a combined total of 50,000 students, develop 16 educational complexes containing 189 schools and 154,000 students, and expand special programs for predominantly minority schools. C.T. 13598-820. Petitioners and most other parties outlined their own desegregation approaches, but only the District presented a specific desegregation plan.

On November 6, 1979, fifteen days after the trial began, the people of California approved Proposition 1 by more than a two-to-one margin.[3] It became effective the day following its enactment. *See* Cal. Const. art. IV, § 24(a).

Proposition 1 amended the Equal Protection Clause of the California Constitution, article I, section 7(a), to prohibit state courts from ordering mandatory student assignment or transportation unless necessary to remedy a specific viola-

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[3]The official vote was 2,433,312 (68.6%) in favor and 1,112,923 (31.4%) against. California Secretary of State, *Statement of the Vote, Nov. 6, 1979 Election*, 4. Prior to the November 6 election, Proposition 1 was passed in the State Senate by a vote of 28 to 6 and in the State Assembly by a vote of 62 to 17. J.A. 258. Proposition 1 was a compulsory referendum on a legislative constitutional amendment. Under the California Constitution an amendment may be proposed by initiative or by the legislature, and it must be approved by a majority of the electorate. Cal. Const. art. XVIII.

tion of the Fourteenth Amendment. On November 15, 1979, the District applied, pursuant to article I, section 7(a), to modify the trial court's interlocutory minute orders concerning Plan 2 and to "hold a hearing to determine whether a federal court, sitting today, would find a de jure violation and impose a remedy involving pupil school assignment or pupil transportation." J.A. 185, 189. Although the parties filed extensive briefs on Proposition 1, the trial court deferred ruling on the District's application until the completion of the pending trial, and Plan 2 remained in operation.

The trial ended on April 11, 1980, after 25 weeks of testimony, 12,000 pages of reporter's transcript, and 450 exhibits. On May 19, 1980, the trial court entered a minute order denying the District's application under article I, section 7(a) of the California Constitution. Cert. Petition 76A. On July 7, 1980, the trial court signed without alteration an eight-page set of findings of fact and conclusions of law petitioners had proposed for the May 19 minute order. Cert. Petition 81A. Neither the trial court's minute order nor the findings of fact ruled upon the constitutionality of Proposition 1. Instead the court held that the findings of fact entered by Judge Gitelson in 1970 established de jure segregation in violation of the Fourteenth Amendment and that the constitutional question was therefore moot. *Id.* at 90A-93A. Despite the voluminous evidence received in the recently completed six-month trial, the trial court's conclusion about de jure segregation was based entirely upon Judge Gitelson's ten-year-old findings. *Id.* at 84A-90A.

On July 7, 1980, the trial court also entered an order, findings of fact and conclusions of law, which rejected the District's voluntary desegregation plan and ordered a new plan ("Plan 3") based on extensive mandatory reassignment of students. J.A. 315-480. All parties filed objections to Plan 3 and all appealed the trial court's July 7 order. C.T.

17159-410 and 17643-720. On July 10, 1980, the trial court, notwithstanding the parties' appeals, ordered immediate implementation of Plan 3 pursuant to California Code of Civil Procedure § 1110b. C.T. 17550.

Although both the California Court of Appeal and the California Supreme Court declined to vacate the trial court's July 7 order by extraordinary writ of mandamus, the trial court's desegregation plan was modified by two stay orders issued by the Court of Appeal during the summer of 1980. J.A. 481 and 505. The principal effects of the stay orders were to prevent the use of an extremely complex multiethnic racial balance reassignment formula, to require the exclusion of naturally desegregated schools from mandatory reassignment, and to prohibit drastic cutbacks in the voluntary magnet and PWT programs. *Id.* On September 12, 1980, Justice Rehnquist denied the District's application to stay Plan 3 and the trial court's July 7 order pending review by this Court. *Board of Education of Los Angeles v. Superior Court*, 448 U.S. 1343 (1980).

The District commenced the 1980 school year on September 16, 1980, under Plan 3, as modified by the Court of Appeal's stay orders. Plan 3 remained in operation through April 10, 1981.

II.
PROCEEDINGS IN THE COURT OF APPEAL.

On July 10, 1980, the District filed two notices of appeal: the first concerning the trial court's order of May 19, 1980, regarding Proposition 1, and the second concerning the order of July 7, 1980, regarding Plan 3. All other parties, including petitioners, also appealed from the trial court's July 7 order. C.T. 17643-720.

The California Court of Appeal expedited briefing upon the suggestion of the state Supreme Court. J.A. 539. Be-

cause of the extraordinary length of the trial court record and delays in its preparation, the Court of Appeal ordered the parties to prepare appendices of testimony and exhibits in conformity with Federal Rule of Appellate Procedure 30. J.A. 540-41. On October 8, 1980, the Court of Appeal, with no objection by petitioners, bifurcated the appeal from the May 19 order concerning Proposition 1 and the appeal from the July 7 order. J.A. 543. The court heard argument on the Proposition 1 appeal on December 8 and filed its unanimous opinion on December 19, 1980. *Crawford v. Board of Education*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (*Crawford II*).

The Court of Appeal's opinion first examined the trial court record to determine whether there was any evidence of de jure segregation within the District. Because the trial court's May 19 and July 7 orders relied exclusively on the findings of fact entered in May 1970 by Judge Gitelson, the court focused on those findings. The Court of Appeal concluded that the 1970 findings of fact and conclusions of law were based on the incorrect view that the Fourteenth Amendment required the District to eliminate racial imbalance, regardless of its cause, and that passive maintenance of a neighborhood school system in the face of residential segregation amounted to a de jure violation. 113 Cal.App.3d at 644-46. The court did not alter the 1970 findings or engage in its own fact finding, but held that the trial court's conclusions of law about de jure segregation were erroneous as a matter of law and inconsistent with this Court's decisions under the Fourteenth Amendment. 113 Cal.App.3d at 649-50.

Having found no Fourteenth Amendment violation that would independently justify Plan 3, the Court of Appeal next examined the constitutionality of Proposition 1. The court traced the school desegregation decisions of this Court

and the California Supreme Court, noting that the California courts had construed the state constitution more broadly than the Federal Constitution in requiring school districts to alleviate de facto segregation. 113 Cal.App.3d at 650-51. Examining Proposition 1, the court held that its purpose and effect were to conform the California Constitution to the Federal Constitution by limiting the power of state courts to require student assignment and transportation as a remedy for de facto segregation. 113 Cal.App.3d at 651-52. The court further held that Proposition 1 did not violate petitioners' rights under the Fourteenth Amendment, was not enacted with discriminatory intent, and did not deprive petitioners of any vested or adjudicated rights. 113 Cal.App.3d at 652-56.

Having held Proposition 1 to be constitutional and that the trial court's May 19 and July 7 orders violated Proposition 1 because the record did not contain evidence of intentional de jure segregation, the Court of Appeal vacated the trial court's orders and remanded the case for further proceedings. 113 Cal.App.3d at 656-57. On December 23, 1980, the court issued an order dismissing as moot all remaining appeals from the trial court's orders.

Following an unsuccessful petition for rehearing in the Court of Appeal, petitioners filed a petition for hearing in the California Supreme Court. Their petition was denied on March 11, 1981, with only Chief Justice Bird dissenting. Cert. Petition 73A; 170 Cal.Rptr. at 510. The Court of Appeal's decision became final under state law on March 11 when the California Supreme Court's ruling was filed. *See* Cal. Rules of Ct. 24 and 25. Petitioners did not apply to this Court or the Circuit Justice for a stay of the Court of Appeal's decision.

III.
RECENT PROCEEDINGS IN THE TRIAL COURT.

The Court of Appeal's remittitur was filed in the trial court on March 12, 1981. Cert. Petition 74A. On March 16, 1981, the Board of Education adopted a resolution which gave parents of students mandatorily reassigned under Plan 3 the option of returning their children to neighborhood schools or remaining in mandatory reassignment beginning on April 20, 1981, the first day of the fourth academic quarter. Petitioners filed a motion for a preliminary injunction in the trial court, which was denied by the Presiding Judge of the Superior Court. The Court of Appeal and the California Supreme Court each denied review of the trial court's ruling.[4]

On April 20, 1981, over 7,000 students (4,300 of whom were minority students) elected to end their participation in mandatory reassignment and return to their neighborhood schools. All of the approximately 16,000 students remaining in paired and clustered schools through the end of the 1980-81 school term did so on a voluntary basis.

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[4]After the state courts had denied the injunction, one group of petitioners' attorneys filed a new action in the United States District Court for the Central District of California. On April 17, 1981, the District Court issued a temporary restraining order prohibiting implementation of the Board of Education's resolution. *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 513 F.Supp. 717 (C.D. Cal. 1981). That order was vacated by the Ninth Circuit Court of Appeals in an extraordinary session on the following day, April 18. 650 F.2d 1004 (9th Cir. 1981). On Easter Sunday, April 19, the federal plaintiffs filed an application with Justice Rehnquist, as Circuit Justice, to stay the order of the Court of Appeals. Their application was withdrawn on Monday, April 20. (*See* No. A-875.) Since that time, the District Court has denied the District's motion to dismiss the case on the grounds of abstention and res judicata, but that ruling is now on appeal pursuant to 28 U.S.C. § 1292(b). The trial court also denied a motion by the District to stay the trial court proceedings pending this Court's decision in *Crawford*. The District has filed a motion in the Ninth Circuit Court of Appeals to stay the trial court proceedings, and that motion is currently under submission.

Judge Paul Egly recused himself from further proceedings in this case on March 16, 1981. Superior Court Judge Robert B. Lopez became the new trial judge on April 17, 1981. During the past summer, Judge Lopez conducted a trial to determine a new desegregation plan for the 1981-82 school term. The District submitted an all-voluntary desegregation plan ("Plan 4"), which was substantially similar to the plan it had proposed in the 1979-80 trial. Petitioners and other parties again presented their own desegregation approaches.

Judge Lopez entered an order on September 10, 1981, following completion of the trial.[5] The order held that Plan 4 satisfied the mandate of *Crawford I* and *Crawford II*, and it granted final approval for implementation of the plan and terminated the court's jurisdiction over all further matters except determination of attorneys' fees and costs.[6] Petitioners have filed a notice of appeal from the September 10 order.

On September 15, 1981, the District commenced the 1981-82 school year under Plan 4, which is presently in operation.

IV.
DESCRIPTION OF THE DISTRICT.

The Los Angeles Unified School District is the nation's largest urban school district with boundaries encompassing 635 schools scattered throughout 710 square miles. J.A. 363-65. In contrast to the densely populated central cities of the East and Northeast, the metropolitan Los Angeles

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[5]A certified copy of Judge Lopez's order has been lodged with the Clerk and is printed at pages A3-A8 *infra*. The District has supplied the order in recognition of its duty to notify the Court of relevant and important developments in the case. *See Fusari v. Steinberg*, 419 U.S. 379, 390 (1975).

[6]Judge Lopez has since entered an order regarding costs and attorneys' fees and has terminated the court's jurisdiction entirely.

area has grown through an amalgamation of suburban communities. The District serves not only the 464 square miles of the City of Los Angeles but also the seven separate cities of Cudahy, Gardena, Huntington Park, Lomita, Maywood, Vernon and San Fernando. In addition, portions of 18 other cities, as well as unincorporated county areas, fall within the District's boundaries. *Id.* It is more than 58 miles from the southern tip of the District in San Pedro to its northwestern boundary in Chatsworth, and from its western to eastern boundaries the District stretches for 30 miles. The sheer size of the District is so great that the Boston, San Francisco, Pittsburgh, Cleveland, Denver and Dayton school districts could be contained within its boundaries simultaneously with room to spare. *Id.*

The Santa Monica Mountains, which extend east to west from the San Gabriel Valley to the Pacific Ocean, completely separate the San Fernando Valley from the more central areas of Los Angeles. In 1979 approximately 70% of all white students in the District resided north of the mountains in the San Fernando Valley. *Id.* Travel between the Valley and the city is limited primarily to three heavily-traveled routes: the Hollywood, Golden State and San Diego Freeways. Two of the Freeways (the Hollywood and Golden State) pass through the congested downtown area of Los Angeles, while the San Diego Freeway is the principal connector between the western portions of the city and the San Fernando Valley. *Id.* Judge Egly found that the great distances and far-flung distribution of the various racial and ethnic groups result in little natural connection between areas, and that the prognosis for desegregation within the District "can fairly be described as being partly the prisoner of the District's geography. . . ." J.A. 364-65.

Over 540,000 students are enrolled in the District, making it the second most populous school district in the nation.

In the past decade the District has experienced dramatic demographic change. In 1966, the District's first racial and ethnic survey of its schools showed a total pupil enrollment of 627,219, of which 351,817 (56.1%) were white, 133,976 (21.4%) were black, 116,531 (18.6%) were Hispanic, and 24,134 (3.9%) were Asian. J.A. 370. Today the enrollment is 543,467, which is composed of 122,526 (22.5%) white, 120,543 (22.2%) black, 257,570 (47.4%) Hispanic, and 40,765 (7.5%) Asian. Los Angeles Unified School District, *October 1981 Ethnic Analysis* 721.[7]

As shown by the following table, the distinctive feature of the District's demography over the past sixteen years has been a rapid decline in white students and an equally rapid increase in Hispanic students.[8]

District Racial and Ethnic Enrollment, 1966-1981

Grades Kindergarten Through 12

	% White	% Black	% Hispanic	% Asian
1966	56.1	21.4	18.6	3.8
1967	54.6	22.0	19.4	3.9
1968	53.7	22.6	20.0	3.6
1969	51.6	23.4	20.8	4.0
1970	49.9	24.1	21.8	4.1
1971	47.7	24.8	22.7	4.6
1972	46.0	25.2	23.9	4.7
1973	44.4	25.3	25.6	4.5

[7]In grades kindergarten through 3 the enrollment is now 15.5% white, 18.2% black, 59.5% Hispanic, and 6.6% Asian. *Id.*

[8]Petitioners have cited statistics showing the admittedly large number of predominantly minority schools within the District. However, they have failed to mention that virtually all of the District's white students presently attend integrated schools. As of October 1981, only four of the District's 635 schools had enrollments more than 70% white. Those schools are Topanga elementary (90.09% white), Anchorage elementary (80.39% white), Crestwood elementary (74.19% white), and Superior elementary (71.71% white). Topanga elementary is geographically isolated in the remote Topanga Canyon area of the San Fernando Valley, and Anchorage elementary is scheduled to be closed soon because of its dwindling enrollment. (Compiled from *October 1981 Ethnic Analysis.*)

	% White	% Black	% Hispanic	% Asian
1974	41.9	24.7	27.8	5.1
1975	40.2	24.5	29.7	5.1
1976	37.0	24.1	32.1	5.9
1977	33.7	24.7	34.9	6.1
1978	29.7	24.6	35.5	6.5
1979	27.0	24.1	41.8	6.7
1980	23.7	23.3	45.3	7.3
1981	22.5	22.2	47.4	7.5

Trial Exhibit 29, Dist. App. 920 (updated with current enrollment data).

The District's changing enrollment patterns have been severely aggravated by the unprecedented loss of white students caused by the implementation of compulsory student reassignment during the pendency of the trial court remedy proceedings. Between October 1976 and October 1980, the District has seen its white student enrollment decline from 219,359 to 125,654 — a loss of 93,705 students. In only four years the District has lost 42.7% of its white student enrollment. Compare J.A. 547 and 548.

The District's demographic picture, particularly when coupled with its enormous area and complex geography, caused Judge Egly to find: "That district-wide desegregation . . . is impossible to achieve by reasonably feasible means because of distances, ratios between white and minority children and propensities to white flight." J.A. 462.

SUMMARY OF ARGUMENT

In *Crawford I*, the California Supreme Court declared that local school districts are obligated to take reasonable and feasible steps to alleviate de facto segregation. The court's decision rested squarely on the California Constitution, which it construed as granting desegregation rights and remedies more expansive than those under the Federal Constitution.

Proposition 1 brings one aspect of this judicially-created state law into conformity with the Federal Constitution: state courts may now order the assignment or transportation of students only if the facts establish a violation of the Fourteenth Amendment. In so doing, Proposition 1 does not create a barrier to effective school desegregation, as petitioners contend. Quite to the contrary, it permits local school districts to adopt any school desegregation remedy, including mandatory student reassignment; it permits state courts to order remedies other than mandatory reassignment to correct de facto segregation; and it permits state courts to include mandatory reassignment in a desegregation order if a Fourteenth Amendment violation is found. Even as amended by Proposition 1, the California Constitution provides desegregation rights and remedies considerably broader than those under the Federal Constitution.

Proposition 1 modifies the remedy applicable to state-created rights; it does not reduce or interfere to any extent with rights or remedies guaranteed by the Federal Constitution. The California state courts have upheld enactments such as Proposition 1, reaffirming the people's right to modify judicially-created state law through initiative and referendum. Recent decisions by this Court recognize that the creation or modification of state constitutional rights falls within the state's prerogative and will be held to violate the Federal Constitution only when federally-protected rights are impaired. Proposition 1 expressly preserves all federally-protected rights, because the remedy of mandatory reassignment is made available in all circumstances where the Federal Constitution requires its use. The approach advocated by petitioners, which would permit states to expand but not contract state-created rights, would require an unprecedented construction of the Fourteenth Amendment and

would seriously impair the dynamic functioning of state constitutional law.

Proposition 1 does not apply just to desegregation cases, and it does not contain a racial classification. It places limitations on the use of mandatory student reassignment, a severe remedy with unique burdens, but it does not divide the citizens of California into racially-identifiable groups. Courts which have reviewed the constitutionality of Proposition 1 and similar enactments have rejected the argument that a racial classification exists. The decisions of this Court relied upon by petitioners do not support their argument because the cases each involved enactments which placed special burdens on a discrete racial group. Proposition 1, which specifically embraces the Fourteenth Amendment and which ensures that school desegregation plaintiffs will continue to have state constitutional rights broader than those under the Federal Constitution, does not place burdens on anyone.

Petitioners contend that Proposition 1 has an unconstitutional purpose and effect, but there is no such finding in the record below. Indeed, the Court of Appeal reviewed the same arguments and materials that petitioners have presented in this Court and it specifically held that Proposition 1 does not have an improper purpose or effect. Given the deference that *Reitman v. Mulkey*, 387 U.S. 369 (1967), requires, the Court of Appeal's holding, which is fully supported by the record and decisions of this Court, is unassailable. Petitioners' arguments about racially discriminatory purpose are based on newspaper clippings, campaign literature and other inadmissible materials which were never introduced in evidence or judicially noticed by the trial court. Even those materials, however, show that Proposition 1 was motivated by factors other than race, and the official election returns for Proposition 1 demonstrate that it re-

ceived widespread support from all racial and ethnic groups throughout the state.

Finally, petitioners' brief includes a lengthy "special appendix" which indirectly raises several arguments about the existence of de jure segregation, the impairment of "vested" or adjudicated rights to the remedy of mandatory rassignment, and the effectiveness of mandatory student reassignment under earlier desegregation plans within the District. In the main, these arguments relate to questions not presented to this Court, are contrary to the record, and do not detract at all from the validity of the ruling below.

ARGUMENT

I.

PROPOSITION 1 CONFORMS STATE COURT USE OF MANDATORY REASSIGNMENT TO THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT; IT DOES NOT PROHIBIT THAT REMEDY.

Petitioners have greatly exaggerated the effect of Proposition 1. They claim that it creates a "barrier" to school desegregation, it "removes" the remedy of mandatory reassignment, and it interposes "major obstacles" to the rights of school desegregation plaintiffs. (Br. at 36 and 42.) All of this might lead one to believe that Proposition 1 sounds a death knell for school desegregation in California and that no state court or local school board may ever again order mandatory reassignment of students.

Proposition 1 does none of these things. As the Court of Appeal held, in desegregation cases Proposition 1 does nothing more than conform the California Constitution to the Federal Constitution in the power of a state court to order mandatory student assignment or transportation as a remedy for nonpurposeful and unintentional racial imbalance. *Crawford II*, 113 Cal.App.3d at 651. Proposition 1 provides in relevant part:

> "In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal

Protection Clause of the 14th Amendment of the United States Constitution."

Proposition 1 thus does not create a "barrier" to school desegregation or "remove" the remedy of mandatory assignment or transportation of students. It specifically incorporates the requirements of the Fourteenth Amendment as the governing standard. The tools of mandatory assignment or transportation may still be ordered so long as a California state court finds a violation of the Fourteenth Amendment. Moreover, Proposition 1 does not create "obstacles" for school desegregation plaintiffs any more than the Fourteenth Amendment itself. The standard of proof for establishing a right to mandatory reassignment or transportation is identical to the standard under the Federal Constitution. The error of petitioners' argument is illuminated by one indisputable fact: For years federal courts have ordered mandatory reassignment where that remedy is appropriate. Proposition 1 permits state courts to do the same.

As amended by Proposition 1, the California Equal Protection Clause now provides three levels of school desegregation remedies. First, a local school board may adopt any school desegregation remedy, including mandatory reassignment. *Crawford II*, 113 Cal.App.3d at 651. That power is expressly reserved by Proposition 1, which states: "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan."

Second, a California court may order remedies other than mandatory reassignment of students to correct nonpurposeful and unintentional racial imbalance. *Crawford II*, 113 Cal.App.3d at 651-52. For example, a court may order a school board to implement many of the programs specifically mentioned in *Crawford I*, 17 Cal.3d at 305, such as magnet schools, voluntary student transfers, teacher and

staff reassignments, improvements in physical facilities, and enriched educational curricula.[9] This Court has endorsed and noted the effectiveness of some of these techniques. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25-26 (1971) (voluntary transfer programs); *Milliken v. Bradley*, 433 U.S. 267, 279-88 (1977) (*Milliken II*) (compensatory education programs).

Finally, a California court may include mandatory reassignment of students in a desegregation order if the evidence establishes a Fourteenth Amendment violation. *Crawford II*, 113 Cal.App.3d at 652. In ordering that remedy, a California court has powers identical to those of a federal court operating under the same facts and circumstances.

Because Proposition 1 does not foreclose mandatory reassignment as a remedy and leaves other effective remedies unchanged, this case is similar to *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980). That case involved the constitutionality of congressional appropriation bills which prohibited the Department of Health, Education and Welfare from requiring mandatory student reassignment as a condition to receiving federal educational funds.[10] The District Court upheld the enactments' constitutionality because their provisions, like those of Proposition 1, do not prohibit mandatory reassignment but simply remove one setting in which it can be used. 455 F.Supp. 837, 841 (D.D.C. 1978).

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[9]As a concrete example of the power permitted by Proposition 1, Judge Lopez has ordered the District to supplement its desegregation plan by locating new magnet schools in minority neighborhoods, maintaining a lower student-teacher ratio in predominantly minority schools, and permitting all interested minority students to participate in the PWT program. Sept. 10, 1981, Order, *infra* at A7

[10]Proposition 1 is even less restrictive than the amendments upheld in *Brown v. Califano*. In contrast to the prohibition against HEW-ordered busing enacted by Congress, Proposition 1 permits California law to be dynamic by incorporating federal decisional law. Thus, as federal law in this area changes, so too will California law.

On appeal, plaintiffs argued that the provisions were unconstitutional because they hampered HEW's efforts to desegregate schools and therefore impermissibly involved the federal government in the preservation of school segregation, and because the statutes were adopted with an improper legislative intent to inhibit school desegregation. The Court of Appeals, in a unanimous opinion by Judge Bazelon, rejected both arguments and affirmed the trial court's ruling. The court's discussion applies equally to Proposition 1:

> "[A]ppellants assert that the amendments, by their plain terms, effect and purpose, violate the fifth amendment by eliminating 'the single, proven, and most effective remedy for desegregating schools receiving federal aid.' There are actually two prongs to this claim: the amendments will effectively inhibit desegregation and thereby dilute the guarantees of the fifth amendment; and the amendments reflect an impermissible legislative motivation to inhibit desegregation. Because the amendments on their face leave open many apparently effective avenues for desegregation, we are not persuaded by either arguement." 627 F.2d at 1230.

II.

A STATE CONSTITUTIONAL AMENDMENT SUCH AS PROPOSITION 1, WHICH MODIFIES STATE-CREATED RIGHTS BUT EXPRESSLY PRESERVES ALL RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION, IS VALID UNDER THE FOURTEENTH AMENDMENT.

As this Court well knows, virtually all school desegregation lawsuits have been based upon the Federal Constitution and have been litigated in the federal courts. Such cases, of course, have been based on this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and their progeny. California apparently stands alone in having a state constitution which has been judicially construed to require school desegregation under

circumstances which do not violate the Federal Constitution. It is therefore unlikely that the particular facts and circumstances involved here will be repeated.

This case does, however, present much broader and more fundamental concerns regarding the relationship between our state and federal constitutional systems. The California Supreme Court's decision in *Crawford I* is part of a growing trend among state courts to give independent vitality to their state constitutions and occasionally grant state constitutional rights more expansive than those guaranteed by the Federal Constitution.[11] Proposition 1 is not the first enactment adopted in response to that trend.

It is therefore important for this Court to determine the manner and circumstances in which a state may modify state-created rights, particularly through the use of a state constitutional amendment such as Proposition 1, which expressly preserves all rights and remedies guaranteed by the Federal Constitution.

A. The California State Courts Have Previously Upheld Enactments Similar to Proposition 1.

Petitioners have expressed alarm that the people of California have amended their constitution to conform the availability of court-ordered student reassignment to the requirements of the Federal Constitution. However, California has enacted similar amendments in the past, with the specific approval of the California courts. In fact, the history of the

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[11] *See, e.g.*, Mosk, *Contemporary Federalism*, 9 Pacific L.J. 711 (1978); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va.L.Rev. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky.L.J. 421 (1974); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 Calif.L.Rev. 273 (1973).

death penalty in California provides a striking parallel to Proposition 1.[12]

In *People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 280, *cert. denied*, 406 U.S. 958 (1972), the California Supreme Court held that the California Constitution prohibited the death penalty. Like *Crawford I*, the court based its ruling squarely on the state constitution and declared the existence of rights more expansive than those under the Federal Constitution. 6 Cal.3d at 634-39.

Later in the same year, the people of California enacted an initiative measure which added article I, section 27 to the California Constitution. That provision purported to overrule *Anderson* by stating that the death penalty did not constitute cruel or unusual punishment under the state constitution.

In *People v. Frierson*, 25 Cal.3d 142, 158 Cal.Rptr. 281, 599 P.2d 587 (1979), the California Supreme Court upheld the constitutionality of article I, section 27, and declared that it evidenced a clear intent by the electorate to conform the California Constitution to the Federal Constitution concerning the death penalty:

> "The clear intent of the electorate in adopting section 27 was to circumvent *Anderson* by restoring the death penalty *to the extent permitted by the Federal Constitution*."

25 Cal.3d at 184-85 (emphasis in original). *See also, Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (noting that the enactment of article I, section 27 effectively negated the California Supreme Court's decision in *Anderson*).

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[12]Petitioners' statement at page 86 of their brief that Proposition 1 is "the only amendment since adoption of the state constitution in 1850 [sic] that restricts the autonomy of California courts with respect to an identified subject matter" is wrong.

Since the enactment of article I, section 27, the California courts have reviewed the death penalty pursuant to the Federal Constitution and federal decisional law. *See Frierson, supra,* 25 Cal.3d at 172-88; *People v. Jackson,* 28 Cal.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149 (1980), *cert. denied,* 450 U.S. 1035 (1981). This of course is the same result achieved by Proposition 1, which also requires state courts to review mandatory reassignment of students pursuant to federal law.[13]

Petitioners have engaged in a long argument about purported acts of racial discrimination in the early history of California. Conspicuously absent from that discussion are any accusations against the California state courts, which have been recognized for their frequent construction of California constitutional provisions as providing greater protection of individual rights than comparable provisions of the Federal Constitution.[14] In addition, as exemplified by *Mulkey v. Reitman,* 64 Cal.2d 529, 50 Cal.Rptr. 881, 413 P.2d 825 (1966), *aff'd* 387 U.S. 369 (1967), the California courts have relied on the Fourteenth Amendment to invalidate legislative enactments that, in the guise of repealing state-created rights, have infringed upon rights guaranteed by the Federal Constitution.

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[13]California is by no means unique in adopting state laws which incorporate standards under the Federal Constitution and federal decisional law. Many other states have done the same. *See* Greene, *Hybrid State Law in the Federal Courts,* 83 Harv.L.Rev. 289 (1969).

[14]*See generally,* Mosk, *Contemporary Federalism,* 9 Pacific L.J. 711, 714 and 718-20 (1978); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 Cal.L.Rev. 273, 277 n.17 and 278 n.18 (1973). *See also, PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

The decision below by the Court of Appeal is by no means a departure from that tradition.[15] As the California Supreme Court did in *Frierson*, the Court of Appeal recognized that constitutional amendment by initiative and referendum is a normal and vital part of the governmental process in California, and judicial construction of the state constitution must give way to a proper expression of the people's will.

B. This Court's Decisions Have Given the States Broad Discretion in Developing and Modifying State-Created Rights, so Long as Rights Guaranteed by the Federal Constitution Are Not Taken Away.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court reviewed a decision of the California Supreme Court which permitted a group of students to distribute pamphlets and circulate petitions within a large privately owned shopping center. Like *Crawford I*, the California Supreme Court's decision was based on its conclusion that the California Constitution provided rights and privileges more expansive than those under the Federal Constitution. In this Court, the shopping center owner contended that the state constitutional rights created by the California Supreme Court violated his property rights and First Amendment rights under the Federal Constitution.

Under the facts presented, this Court unanimously held that the students' exercise of their state-created right of free speech did not violate the shopping center owner's rights

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[15]Moreover, the California Supreme Court's denial of the petition for hearing in this case does have significance. In *Eisenberg v. Superior Court*, 193 Cal. 575, 578, 226 P. 617 (1924), the California Supreme Court said "The order of this court denying a petition for transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in that opinion." *Accord, Di Genova v. State Board of Education*, 57 Cal.2d 167, 178, 367 P.2d 865, 18 Cal.Rptr. 369 (1962).

under the Federal Constitution. 447 U.S. at 82-88. The Court's opinion explained that a state may properly grant rights and privileges more expansive than those guaranteed by federal law, so long as the state-created rights do not contravene any provisions of the Federal Constitution.[16] 447 U.S. at 80-81.

PruneYard demonstrates that an expansive declaration of state constitutional rights is a proper exercise of a state's prerogative if it does so in a manner which does not deprive its citizens of rights guaranteed by the Federal Constitution. Even though the California Supreme Court adopted a holding entirely different from the result reached by this Court under the Federal Constitution in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), this Court refused to interfere because *PruneYard* affected only state-created rights.

The rationale in *PruneYard* applies with equal force to a reduction or modification of existing state-created rights. Just as in *PruneYard*, the subject of inquiry must be the effect of the state's action upon rights guaranteed by the Federal Constitution. The Fourteenth Amendment does not invalidate an enactment such as Proposition 1, which reduces or modifies state-created rights but does so by expressly incorporating federal law and ensuring that a student's entitlement to the remedy of mandatory reassignment is identical to his entitlement under the Federal Constitution.

This principle was recognized by Justice Rehnquist when he analyzed Proposition 1 in September 1980:

> "Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the

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[16]The holding in *PruneYard* has been recognized by this Court on earlier occasions in dictum. *See Oregon v. Haas*, 420 U.S. 714, 719-20 (1975); *Sibron v. New York*, 392 U.S. 40 (1968); *Cooper v. California*, 386 U.S. 58 (1967) (all involving criminal procedure).

> federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

Board of Education of the City of Los Angeles v. Superior Court, 448 U.S. 1343, 1345 (1980) (quoting Superior Court Judge Melvin E. Cohn's order upholding the constitutionality of Proposition 1 in *Tinsley v. Palo Alto Unified School District*, No. 206010, Cal. Superior Ct., San Mateo County, July 10, 1980).[17] The Court of Appeal adopted this analysis in upholding Proposition 1. *Crawford II*, 113 Cal.App.3d at 654.

This principle is also apparent from this Court's opinion in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), which said:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Accord, Reynolds v. Sims, 377 U.S. 533, 584 (1964) ("[S]tate constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated."). *See also, North Carolina Board of Education v. Swann*, 402 U.S. 43, 45 (1971) (affirming a District Court decision which declared unconstitutional a North Carolina anti-busing statute because it intruded upon federally protected rights).

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[17]The *Tinsley* plaintiffs have appealed Judge Cohn's determination that Proposition 1 is constitutional. On October 29, 1981, the California Court of Appeal, First Appellate District, ordered the appeal stayed pending this Court's ruling in *Crawford*.

There is nothing in Proposition 1 which deprives any California citizen of rights or remedies guaranteed by the Federal Constitution. Proposition 1 explicitly conforms state court use of mandatory reassignment to the same standards used by federal courts under the Federal Constitution. Under the California Constitution, the remedy of mandatory reassignment is available in all circumstances where the Federal Constitution requires its use.

In fact, Proposition 1 closely parallels federal statutes enacted by Congress pursuant to its power to enforce the Fourteenth Amendment. The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, places strict limitations on remedies which may be ordered to correct racial imbalance that does not violate the Fourteenth Amendment. Federal courts which have reviewed these provisions have concluded that "The Act manifests an intention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution." *Morgan v. Kerrigan*, 530 F.2d 401, 411 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976); *accord, Hart v. Community School Board*, 512 F.2d 37, 52 (2d Cir. 1975). This is the same effect achieved by Proposition 1.

C. The Theory Advanced by Petitioners Would Distort the Functioning of State Constitutional Law.

The Court of Appeal held that Proposition 1 conforms the California Constitution to the Federal Constitution in only one area: the power of a state court to order mandatory reassignment of students as a remedy for nonpurposeful and unintentional racial imbalance. *Crawford II*, 113 Cal.App.3d at 651. Even as amended by Proposition 1, the California Constitution provides broader protection than federal law. California state courts may still alleviate de facto segregation by ordering desegregation plans which rely on techniques

other than mandatory reassignment or transportation of students. In contrast, a federal court has no power to remedy de facto segregation under the Federal Constitution. *E.g., Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977) (*Dayton I*) ("The finding that the pupil population in the various Dayton schools is not homogenous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board."); *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*) ("[T]he Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more.").

Despite the narrow effect of Proposition 1, petitioners claim that it violates the Fourteenth Amendment because it limits the use of a specific remedy which could be used in the vindication of a state constitutional right. However, petitioners have not identified any authority which interprets the Fourteenth Amendment as *requiring* a state to provide a specific remedy — or any remedy whatsoever — for the vindication of a purely state-created right.

The theory advocated by petitioners essentially regards the Fourteenth Amendment as a "ratchet wrench" which would permit states to expand but not contract state constitutional rights and remedies.[18] Under petitioners' theory, although the Federal Constitution would freely permit the expansion of state constitutional rights, any reduction of those same rights would be precluded by the Fourteenth Amendment unless a compelling state interest could be demonstrated. Members of this Court have expressed serious

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[18]As the Court of Appeal noted, petitioners took the extreme position below that the Fourteenth Amendment would prohibit California from reducing state-created rights and remedies in any area. *Crawford II*, 113 Cal.App.3d at 654.

objection to any interpretation of the Federal Constitution which would "lock in" the states to a particular course of action. *Palmer v. Thompson*, 403 U.S. 217, 228 and 230 (1971) (Burger, C.J., and Blackmun, J., concurring); *PruneYard Shopping Center v. Robins*, *supra*, 447 U.S. at 93 (Marshall, J., concurring); *Hunter v. Erickson*, 393 U.S. 385, 396-97 (1969) (Black, J., dissenting).

The "ratchet wrench" approach advocated by petitioners would limit the people of any state to a one-way exercise of their power to adopt changes in their state constitution. This would seriously distort the normal functioning of state constitutional law. Every state in the nation permits its legislature to propose constitutional amendments, and twenty-one states permit amendments by initiative and referendum.[19] As one commentator has noted: "While the Federal Constitution is amended infrequently and only with great difficulty . . . state constitutions by contrast are periodically revised to reflect changing values."[20]

Revision of the state constitution by direct participation of the people is an especially vital part of the governmental process in California. Under the California Constitution, the power of initiative and referendum is expressly reserved by the people (art. IV, § 1), and all constitutional amendments must be approved by a majority of the electorate (art. XVIII, § 1-4). These provisions were specifically designed to enable the electorate to participate directly in the formulation of governmental policy in California,[21] and they have been vigorously utilized for that purpose. Between 1884 and

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[19]W. Crouch, J. Bollens & S. Scott, *California Government & Politics*, 95 (5th ed. 1972).

[20]Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va.L.Rev. 873, 939 (1976).

[21]V.O. Key & W. Crouch, *The Initiative and Referendum in California*, 571 (1939).

1980, there were 735 constitutional amendments placed before the electorate of which 438 were approved.[22]

This Court has praised the referendum process as a means for "direct political participation" which is designed to "give citizens a voice on questions of public policy." *Eastlake v. Forest City Enterprises, Inc.*, 626 U.S. 668, 673 (1976). It has also described the referendum as a "procedure for democratic decisionmaking" which "demonstrates devotion to democracy." *James v. Valtierra*, 402 U.S. 137, 141 & 143 (1971).

Use of the initiative and referendum process is especially important when, as in this case, an amendment concerns state constitutional doctrine created by the judiciary and not an express provision written into the state constitution. When a state court's decision is based on its construction of the state constitution and the decision is not challenged as impairing federally-protected rights, it is not subject to review by this Court. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489-90 (1965). For that reason, a state constitutional amendment may be the only means of limiting decisions by a state supreme court based upon independent and adequate state grounds. Indeed, in a decision by the Supreme Judicial Court of Massachusetts declaring the death penalty invalid under the state constitution, a concurring justice expressly noted that a constitutional amendment by initiative or referendum would provide an effective check on the court's power if the people disagreed with its decision. *Commonwealth v. O'Neal*, 369 Mass 242, 275, 339 N.E.2d 676, 694 (1975) (Hennessy, J., concurring).

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[22]California Secretary of State, *California Statewide Ballot Measures, 1884 to 1981*, 5 (1981). The history of constitutional revision in California has been described by one commentator as "constitutional amendomania." Comment, *California's Constitutional Amendomania*, 1 Stan.L.Rev. 279 (1949).

III.

PROPOSITION 1 IS FREE FROM THE IMPERMISSIBLE RACIAL CLASSIFICATIONS WHICH WERE CLEAR IN THE CASES RELIED UPON BY PETITIONERS.

Petitioners contend that Proposition 1 contravenes the Fourteenth Amendment because it "embodies an impermissible racial classification" that "interposes race-specific obstacles to state judicial relief." (Br. at 34.) The court below rejected this contention, as did the other courts that have considered Proposition 1's constitutionality. *See Board of Education v. Superior Court, supra,* 448 U.S. at 1345 (Rehnquist, J., Circuit Justice), which quoted Superior Court Judge Melvin E. Cohn's order upholding Proposition 1 in *Tinsley v. Palo Alto Unified School District,* No. 206010, Cal. Superior Ct., San Mateo County, July 10, 1980 (appeal pending).

In *Brown v. Califano, supra,* 627 F.2d 1221, the minority plaintiffs also contended that a series of amendments to congressional appropriations bills embodied an impermissible racial classification in violation of the Fifth Amendment. The Court of Appeals rejected their contention and held that "[t]he amendments here at issue make no classification along impermissible lines, . . ." 627 F.2d at 1230. The amendments to which the court referred prohibited HEW from using its authority to terminate federal funding

> "to induce school districts to require student transportation beyond schools closest to their homes. They do not in any way restrict HEW's authority to threaten or actually terminate funds with respect to any other desegregation remedy which would suffice. Thus, HEW can reject fund applications which fail to provide for magnet schools, faculty desegregation, school construction or school closings that enhance desegregation, or other nontransportation remedies it deems necessary

for compliance with Title VI and the Constitution." 627 F.2d at 1231 (footnotes omitted).

As the court summarized, "Congress wanted to ensure that mandatory busing orders derive either from local school officials or federal courts." *Id.*

The resemblance does not stop there. Like Proposition 1, the amendments challenged in *Brown v. Califano* were enacted promptly after court orders requiring HEW to resume its enforcement of Title VI of the Civil Rights Act of 1957. 627 F.2d at 1223 n.1. Also like Proposition 1, nothing in the amendments restricted a court's power to order busing to remedy Fourteenth Amendment violations. Appellants, like petitioners here, criticized the amendments as "eliminating 'the single, proven, and most effective remedy for desegregating schools receiving federal aid.' " 627 F.2d at 1230.

The amendments upheld in *Brown v. Califano* removed the power to compel busing from the arsenal of techniques HEW could employ to desegregate schools that receive federal funding. If those amendments "make no classification along impermissible lines," as the Court of Appeals held, then Proposition 1 also does not.

The issue which *Brown v. Califano* decided and which this case presents, is whether the elimination of a previously available remedy that is not constitutionally required can be said to violate the United States Constitution because the use of the remedy had affected minority students. This Court has already decided a closely analogous question by holding that a state agency may constitutionally rescind an act that it was not constitutionally required to perform. *Dayton I, supra,* 433 U.S. at 413-14; *accord, Dayton Board of Education v. Brinkman,* 443 U.S. 526, 531 n.5 (1979) (*Dayton II*). The fact that the rescinded act affected minority students

did not create an improper racial classification in *Dayton I* and does not do so here.

Petitioners rely heavily on *Hunter v. Erickson, supra*, 393 U.S. 385,[23] *Reitman v. Mulkey, supra*, 387 U.S. 369, and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), *aff'd mem.* 402 U.S. 935 (1971), in arguing that state action eliminating state protection from racial discrimination violates the Fourteenth Amendment. But the holding of these cases, particularly when examined in light of *Dayton I*, does not support petitioners' position. To be sure, in both *Hunter* and *Reitman* the state action held to violate the Fourteenth Amendment repealed fair housing statutes that were not constitutionally required, but in each instance the challenged legislation eliminated more rights than the repealed statutes had granted, leaving the minority plaintiffs worse off than if the fair housing measures had never been enacted.

In *Hunter*, for example, this Court noted that although Akron was not required to have a fair housing ordinance, the city could not properly impose greater requirements to the enactment of fair housing legislation than had to be met for other types of housing legislation. 393 U.S. at 396. The challenged city charter amendment required all ordinances concerning housing discrimination on the basis of race, religion or national origin to be approved by a majority vote of the city electorate after passage by the city council but did not require any voter ratification for other housing ordinances. Thus the wrong flowing from the charter amendment was clear: minority citizens suffered from an increased burden in enacting fair housing ordinances. This made the charter amendment a clear violation of the Equal Protection

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[23]In *James v. Valtierra*, 402 U.S. 137, 140-41 (1971), this Court refused to extend *Hunter* because the California constitutional provision in question, like Proposition 1, did not create a racial classification.

Clause of the Fourteenth Amendment, because it "was an *explicitly* racial classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389 (emphasis added).

In *Reitman* this Court affirmed the California Supreme Court's invalidation of a state constitutional amendment which (1) repealed state unfair housing legislation, (2) applied a state constitutional imprimatur to private racial discrimination in the sale and rental of housing and (3) prohibited the enactment of fair housing statutes or ordinances by the state or any of its counties, cities or towns. Although each of these effects disadvantaged the same racially identifiable class, this Court found only the second and third constitutionally invalid.

Both *Hunter* and *Reitman* stated that no Fourteenth Amendment violation would have occurred if the state had done no more than eliminate the rights it had previously granted. *Hunter*, 393 U.S. at 390 n.5; *Reitman*, 387 U.S. at 376 & 380-81. *Accord*, *Dayton I*, 433 U.S. at 413-14; *Dayton II*, 443 U.S. at 531 n.5. Proposition 1 does not eliminate any state or federal right, and even before its enactment the California Supreme Court had declared in *Crawford I* that busing was not a constitutionally-required remedy for de facto segregation:

> "[C]ourt decisions time and time again have emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. . . . As with the numerous desegregation techniques adverted to above, in some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." 17 Cal.3d at 309.

The resemblance between the present case and *Lee v. Nyquist* is superficial at best and disappears after brief analysis. The state law declared invalid in *Lee* was a flat prohibition against racial reassignment for school desegregation by appointed school boards. 318 F.Supp. at 712. Although the district court overturned the New York Education Law provision in part as an impermissible racial classification, the Court's memorandum affirmance does not constitute an endorsement of that court's reasoning. *Mandel v. Bendley*, 432 U.S. 173, 176 (1977). The affirmance of *Lee v. Nyquist* is fully explained by this Court's decision in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), which also declared a flat prohibition against busing unconstitutional. *Swann* compels the result in *Lee* and was decided less than two weeks earlier.

Finally, petitioners have relied heavily on *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), now No. 81-9 before this Court. As interpreted by the Ninth Circuit Court of Appeals, Washington Initiative 350 contains the same absolute prohibition against busing for desegregation that was declared invalid in *North Carolina Board of Education v. Swann, supra*, 402 U.S. 43, and *Lee v. Nyquist, supra*, 318 F.Supp. 710. As the Ninth Circuit Court of Appeals explained in distinguishing *Seattle* from *Brown v. Califano, supra*, 627 F.2d 1221,

> ". . . Initiative 350 flatly prohibits local officials from busing beyond neighborhood schools if the purpose is to desegregate the schools. Busing beyond neighborhood schools for all other significant reasons is permitted. This is significantly different from the amendments, which the *Brown* court concluded did not 'make [a] classification along impermissible [racial] lines.' " 633 F.2d at 1347.

Proposition 1 differs from Initiative 350 for the same reasons.[24]

The Ninth Circuit Court of Appeals held that the flat prohibition it found in Initiative 350 impermissibly interfered with local school districts' control of their schools:

> "Initiative 350 effectively disenfranchises the voters of the local school districts with respect to local educational matters. The interest of the State of Washington in mandating a state-wide policy of neighborhood schools must, in these circumstances, fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy." 633 F.2d at 1346.

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[24]The classification that Proposition 1 makes among remedies is by no means racial. It plainly prohibits a state court from ordering any busing that is not required to remedy a Fourteenth Amendment violation, and neither its language nor the Attorney General's official ballot summary (J.A. 257-58) mentions either race or desegregation. Proposition 1 was supported by all races, and passed in every county. In fact, the two counties in which it received the lowest percentage of the vote were Humboldt and Marin (53.2% and 55.2% approval, respectively), which have virtually all-white populations, while it received the approval of 73.9% of the voters in Los Angeles County, where the minority population is nearly 50%. California Secretary of State, *Statement of the Vote, November 6, 1979 Election*, 3.

The Court of Appeal quite logically limited its discussion of Proposition 1 to its effect on desegregation cases such as the one before it, and made no attempt to catalog its effects on other types of pupil school assignment or transportation, which were not involved in the case. *Crawford II*, 113 Cal.App.3d at 653. The flat assertion in petitioners' brief (at pp. 45-46 n.25) that "mandatory student assignment for . . . relieving overcrowded schools or fulfilling the educational rights of handicapped children . . . remains untouched" by Proposition 1 is contrary to the amendment's plain language. Significantly, petitioners cite no authority to support that contention. To the contrary, *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal.3d 208, 245-46, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978), which petitioners cite (Br. at 41 n.22), states that "a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words," and notes that "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language."

In contrast, Proposition 1 specifically reserves to local school boards the power to implement a busing plan voluntarily.

IV.

PROPOSITION 1 DOES NOT HAVE AN UNCONSTITUTIONAL PURPOSE OR EFFECT.

In part two of their brief, petitioners attribute to Proposition 1 an unconstitutional purpose and effect, in violation of this Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In support of their argument, petitioners have referred the Court to newspaper clippings, campaign literature, historical treatises and other voluminous materials which they placed in the Joint Appendix.

All of the materials contained in the Joint Appendix were also presented to each of the state courts below, and none of those courts accepted the arguments advanced by petitioners. The record below contains no finding of any impermissible purpose behind Proposition 1. Quite to the contrary, the Court of Appeal carefully analyzed the arguments and materials presented by petitioners and concluded that Proposition 1 does not have a discriminatory purpose or effect. *Crawford II*, 113 Cal.App.3d at 650-55. Indeed, the court characterized petitioners' arguments as "pure speculation." 113 Cal.App.3d at 655.

Petitioners apparently concede the absence of direct evidence or findings in support of their arguments because they contend that "discriminatory purpose may be *inferred* from the totality of relevant facts." (Br. at 64; emphasis added.) It is not necessary, however, for this Court to engage in its own fact finding or make inferences from the record. The Court of Appeal engaged in a full analysis which is

consistent with the decisions of this Court. In addition, the voluminous materials offered by petitioners to prove an impermissible purpose behind Proposition 1 were never admitted in evidence or judicially noticed by the trial court during the six-month trial below.

A. As in *Reitman v. Mulkey*, This Court Should Accept the Holding Below Regarding the Purpose and Effect of Proposition 1.

Although petitioners have relied extensively on this Court's opinion in *Reitman v. Mulkey*, *supra*, 387 U.S. 369, they have ignored one of its principal holdings. In *Reitman*, the California Supreme Court examined the "immediate objective," "ultimate effect" and "historical context" of Proposition 14 and concluded that the proposition unconstitutionally involved the state in private racial discrimination concerning housing matters. In affirming, this Court gave extreme deference to the conclusions drawn by the California Supreme Court:

> "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 14], and familiar with the milieu in which that proposition would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court." 387 U.S. at 378-79; *accord*, 387 U.S. at 373-74 & 381.

Petitioners contend that an examination of the "immediate objective," "ultimate effect," and "historical context" of Proposition 1 demonstrates a similarly unconstitutional purpose and effect. However, the California Court of Appeal engaged in precisely that analysis and held that Proposition 1 does not have a discriminatory purpose or

effect. *Crawford II*, 113 Cal.App.3d at 650-56. As in *Reitman*, this Court should accept that holding.

Petitioners have challenged the Court of Appeal's holding because it was not based upon any trial court evidence or findings that were specifically directed to the purpose and effect of Proposition 1. Petitioners apparently contend that the Court of Appeal's holding cannot be supported by anything short of a broad-ranging trial about the motivations and beliefs of the electorate. In *Reitman*, however, this Court accepted the holding about the purpose and effect of Proposition 14 even though there had been no evidentiary hearings of any kind at the trial court level. The California Supreme Court's opinion in *Mulkey v. Reitman*, 64 Cal.2d 529, 532, 50 Cal.Rptr. 881, 413 P.2d 825 (1966), states clearly that "[i]n the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations."

The deference shown by this Court in *Reitman* is particularly appropriate under the circumstances of this case. This Court has noted that it is extraordinarily difficult to determine legislative motives and purposes. *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Analysis of subjective purpose and motivation approaches the impossible when the subject of inquiry is an initiative or referendum, for which the electorate makes decisions in the privacy of a voting booth.

B. The Court of Appeal's Holding About the Purpose and Effect of Proposition 1 Is Supported by the Record.

The most instructive evidence about the purpose of Proposition 1 is the language of the proposition itself. As this Court has held, "[t]here is, of course, no more persuasive

evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

Petitioners contend that Proposition 1 was designed to end school desegregation in California, but its language certainly does not accomplish that purpose. Proposition 1 is extremely narrow in its focus and effect. As the Court of Appeal held, it simply conforms state court use of mandatory reassignment to the requirements of the Fourteenth Amendment. *Crawford II*, 113 Cal.App.3d at 651-52. Far from ending school desegregation efforts, it leaves many effective remedies unchanged and still permits courts to order mandatory student reassignment when a Fourteenth Amendment violation is found.

In *Brown v. Califano, supra*, 627 F.2d at 1234 n.78, the Court of Appeals rejected arguments about improper purpose similar to those made in this case by petitioners. The plaintiffs offered many statements by individual congressmen that revealed opposition to mandatory busing of students. The Court of Appeal, however, held that legislative motive was not even relevant because the statute was narrowly drawn. *See also, United States v. O'Brien, supra*, 391 U.S. at 383.

Even the materials petitioners have presented to this Court in the Joint Appendix show that Proposition 1 was not motivated by an improper purpose. At most, petitioners' materials show opposition to mandatory busing of students — not racial discrimination. Thus, while petitioners have quoted some of the remarks contained in the California Secretary of State Ballot Pamphlet for the November 6, 1979, election, they have ignored the arguments in favor of Proposition 1 by the Reverend W. C. Jackson. Rev. Jackson is a black parent and the pastor of the Beth Ezel Baptist Church in Watts, a minority neighborhood in south-

central Los Angeles. J.A. 268-69. Rev. Jackson urged the adoption of Proposition 1, and quoted Los Angeles Mayor Tom Bradley, also a black parent, as saying: "Most parents, whatever their color, whatever their background, wherever they live, don't want their kids transported back and forth across the city." J.A. 268.

The official election returns for Proposition 1, compiled by California Secretary of State March Fong Eu, show that the voting patterns in California were completely unrelated to race. It was enacted by 68.6% of the electorate, and it was approved by a majority of the voters in each one of the state's 58 counties. California Secretary of State, *Statement of the Vote, Nov. 6, 1979 Election*, 3-4. It received more than 50% of the vote in 79 of the state's 80 assembly districts, many of which have elected minority assembly representatives. *Id.* at 43-46. Even in the single assembly district in which it failed to receive a majority of the vote, it was approved by 46.2% of the voters.[25] *Id.* at 46.

C. The Newspaper Clippings, Campaign Literature and Other Materials Presented by Petitioners Are Inadmissible and Not Properly Before This Court.

Petitioners have stated that they were the only party to introduce evidence at the trial court level regarding the purpose and motivation underlying the enactment of Proposition 1. (Br. at 24 and 91.) This is a misleading description of the proceedings below.

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[25]The same California electorate which approved Proposition 1 has in recent years elected an Asian United States Senator, a black Lieutenant Governor, an Asian Secretary of State, a black State Superintendent of Public Instruction, and many other Hispanic, black and Asian public officials. One of the leading contenders in the upcoming gubernatorial election is Los Angeles Mayor Tom Bradley, who is black.

Petitioners did not introduce any testimony, exhibits or other evidence on this subject. They simply lodged a voluminous "appendix" with the trial court containing newspaper clippings, campaign literature, excerpts from historical treatises, and other unofficial documents. J.A. 191-256. They later submitted a copy of the California Secretary of State Ballot Pamphlet for the November 6, 1979, election. J.A. 257-79. These materials were "authenticated" by a declaration by one of petitioners' attorneys, who merely said he had "examined" them. J.A. 191.

Petitioners cannot even say that the materials in their appendix were judicially noticed by the trial court. Under California law, a party must make a specific request for a trial court to take judicial notice. Cal. Evid. Code §§ 450 and 452. If the subject matter of the request "is of substantial consequence to the determination of the action," the court must give the opposing party an opportunity to respond (*id.* § 455), and it must then determine "the propriety of taking judicial notice of a matter or the tenor thereof" (*id.* § 454). This procedure was not followed in the trial court. Petitioners never requested the court to take judicial notice of the materials in their appendix and the court did not do so on its own motion.

The District moved to strike petitioners' appendix as irrelevant, without foundation, and based on hearsay. J.A. 307-08. The trial court did not rule on the District's motion and declared it moot, because the court did not determine the constitutionality of Proposition 1. Cert. Petition 20A.

In fact the District's motion to strike was well-taken. The newspaper clippings and other second-hand documentary evidence submitted by petitioners are clearly inadmissible hearsay. *Shumate v. Johnson Pub. Co.*, 139 Cal.App.2d 121, 133, 293 P.2d 531 (1956). The historical treatises are also inadmissible hearsay. Cal. Evid. Code § 1341; B. Jef-

ferson, *Cal. Evidence Benchbook* § 17.2. Finally, the campaign literature, newspaper clippings and other materials concerning remarks by the author of Proposition 1 are not only hearsay but also have very little evidentiary value. *Lewis v. Ryan*, 64 Cal.App.3d 338, 355 n.1, 134 Cal.Rptr. 355 (1976). *Accord, Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").[26]

Finally, the historical material presented by petitioners concerning purported acts of discrimination in California's early history have no relevance to the constitutionality of Proposition 1. Many of the incidents described by petitioners occurred even before the adoption of the Thirteenth and Fourteenth Amendments, and virtually all occurred before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Many pages of this brief could be spent refuting petitioners' lengthy arguments about the early history of California, but the short answer is contained in the recent plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (Stewart, J.):

> "But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case.

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[26]Petitioners suggest that if their showing in this Court is insufficient, the case should at least be remanded for further hearings on the purpose and motivations behind Proposition 1. (Br. at 93 n.53; *see also* amicus briefs of Lawyers' Committee on Civil Rights at 13, and African American Education Commission, et al., at 51.) However, in the state courts below petitioners relied entirely on their newspaper clippings, campaign literature and other unofficial documents. They never requested hearings in the trial court on the electorate's purpose and motivations, nor did they urge the California Court of Appeal or the California Supreme Court to remand for that purpose.

More distant instances of official discrimination in other cases are of limited help in resolving that question."

V.

OTHER MATTERS INDIRECTLY RAISED BY PETITIONERS DO NOT CONCERN THE QUESTIONS BEFORE THIS COURT AND CANNOT AFFECT THE VALIDITY OF THE RULING BELOW.

The previous sections of this brief have addressed the arguments and questions that are directly raised by petitioners' opening brief on the merits. However, petitioners' brief also includes a long "special appendix" which contains an argumentative summary of the proceedings in this case. (Br. at A1-A35.) Besides lengthening their brief in apparent violation of Supreme Court Rule 33.3, the special appendix seems designed to indirectly raise several matters that are not before this Court. Because these matters are not directly at issue, we hesitate to address them at all, but a brief response seems appropriate.

A. Assertions of De Jure Violations.

Petitioners' special appendix contains a number of remarks which are apparently designed to raise indirectly the question whether the District has engaged in acts of de jure segregation in violation of the Fourteenth Amendment. That question was thoroughly considered by the Court of Appeal. After extensive briefs and a plenary hearing, the court concluded that the record did not contain any evidence of de jure violations. *Crawford II*, 113 Cal.App.3d at 638-50. The California Supreme Court, which in 1976 reviewed the original findings of the trial court and expressed views about them in dictum, refused to overturn the Court of Appeal's determination.

Petitioners have not challenged the Court of Appeal's holding in this Court. Their petition for certiorari did not include a question directed to the existence of any de jure violations, and they have not made any motion to amend their petition.[27] In *Irvine v. California*, 347 U.S. 128, 129 (1954), this Court stated: "We disapprove the practice of smuggling additional questions into a case after we grant certiorari." We therefore suggest that petitioners' special appendix and their remarks about de jure segregation should be ignored.

Two amici curiae (the African American Education Commission, *et al.*, and the Lawyers' Committee on Civil Rights) have suggested that the case should be remanded for further proceedings on de jure issues. The rule against "smuggling additional questions into a case" applies to them as well. Furthermore, petitioners have already had at least three recent opportunities in the trial court to prove or specify de jure violations, and they have *declined* to do so.

In its original application filed in November 1979 the District specifically requested hearings to determine whether any current Fourteenth Amendment violations existed, but petitioners opposed that request. J.A. 189. When the trial court denied its application in May 1980, the District requested findings of fact. C.T. 16965. The court's findings, which petitioners prepared and the court signed without change, relied entirely on the ten-year-old findings entered by Judge Gitelson, even though the parties had just completed a six-month trial which examined all facets of the District's operations. Cert. Petition 81A-83A. Finally, the Court of Appeal's decision remanded the case to the trial

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[27]In fact, on page 48 of their brief on the merits, petitioners state: "For it is racial discrimination in the judicial apparatus of the state, *not racial discrimination of the state's schools*, that petitioners challenge under the Fourteenth Amendment in this case." (Emphasis added.)

court for further proceedings. *Crawford II*, 113 Cal.App.3d at 656. When those proceedings were resumed before Judge Lopez last year, petitioners did not allege any de jure violations by the District and they did not seek to have that question litigated.

B. Remarks About Petitioners' "Vested Right" to Mandatory Reassignment.

The Court of Appeal held that Proposition 1 did not deprive petitioners of any "vested right" in violation of the due process clause of the Fourteenth Amendment. *Crawford II*, 113 Cal.App.3d at 655-56. The petition for certiorari specifically challenged that holding in one of the questions presented for review (Cert. Petition ii), but petitioners' brief on the merits fails to address that question and contains only indirect contentions that Proposition 1 deprives them of a vested right. Under this Court's normal practice, petitioners' failure to address the question directly in their brief on the merits constitutes an abandonment. *See Travelers Health Assn. v. Virginia*, 339 U.S. 643, 651 n.4 (1950). If petitioners should claim that they have not abandoned this question, the District incorporates the discussion contained on pages 19 through 20 of its brief in opposition to the petition for certiorari.

C. Remarks About the Effectiveness of Mandatory Reassignment Within the District.

Petitioners' special appendix attempts to create the impression that mandatory reassignment of students is the only effective desegregation remedy within the District and that the two mandatory desegregation plans in operation between 1978 and 1980 utilized that tool with productive and effective results. These arguments have little to do with the constitutionality of Proposition 1, and they are in all events wrong.

The District has had three years of experience with mandatory reassignment under two different plans, and the results have been tragic. Rather than producing desegregation, the mandatory components of Plans 2 and 3 caused previously integrated schools to become minority segregated and left most of the targeted minority schools essentially unchanged. Between 1976 and 1980, the District's white enrollment declined by 42.7%. Compare J.A. 547 and 548. Those losses were concentrated at schools involved in mandatory reassignment, where the white loss rate was over 75% in some instances. *See generally*, Trial Ex. 107; Dist. App. at 996.

In contrast to the counterproductive results under mandatory reassignment, the voluntary components of Plans 2 and 3 provided minority students with a stable, desegregated education. The District has assessed the performance of the plans in use over the past three years and has concluded that a voluntary desegregation plan would produce the best results.[28] In *Crawford I*, the California Supreme Court declared that "local school boards should clearly have the initial and primary responsibility for choosing between . . . alternative [desegregation] methods." 17 Cal.3d at 305. The Court of Appeal pointedly criticized the trial court for failing to abide by that principle. *Crawford II*, 113 Cal.App.3d at 649.

Petitioners' remarks about the effectiveness of mandatory reassignment are based largely upon findings of fact entered by Judge Paul Egly in May 1980 before the implementation

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[28]On page A-29 of their special appendix, petitioners claim that the District's all-voluntary desegregation plan was opposed by Rita Walters, "the only minority member" of the Board of Education. If by "minority member" petitioners mean the only Board member who opposed the plan, they are correct. However, the plan was supported by Board member Anthony Trias, who is an Asian.

of Plan 3. However, following last summer's trial Judge Robert Lopez approved the District's voluntary desegregation plan and terminated further jurisdiction. In his September 10, 1981, order, Judge Lopez concluded:

> "A genuine opportunity must be given to the Board to show progress *under present conditions*. The Court finds that the Board has embarked on a course of action that under present conditions seeks to realize the hope of society and alleviate the various harms to the children in the District. After the balancing and reconciliation of many competing values, the Court finds that the Plan, as ordered changed by the Court, will protect the rights of all students and meet Constitutional standards." September 10, 1981, Order, *infra* at A7-A8 (emphasis in original).

CONCLUSION

The decision below by the California Court of Appeal should be affirmed.

Respectfully submitted,

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